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FILED
AUG 26 1953
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 289

EDWARD DAVID REED,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

JACK HENRY PARKHURST,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners, Edward David Reed and Jack Henry Parkhurst, pray that a Writ of Certiorari

issue to review the judgments of the United States Court of Appeals for the Ninth Circuit, entered on June 12, 1953 [R 242; P 372]* which judgments affirmed the convictions of petitioners for violating Section 12(a) of the Universal Military Training & Service Act, Title 50 U.S.C., App. Section 462(a).

OPINION BELOW.

On the date of the submission of this Petition the opinion of the United States Court of Appeals for the Ninth Circuit was not yet officially reported.

JURISDICTION.

1. The judgments of the Court of Appeals were entered on June 12, 1953 and the Orders denying Petitions for Rehearing were entered on July 27, 1953. [R 243; P 373] The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

2. The bases upon which it is contended that the Supreme Court has jurisdiction herein, and the cases which support such jurisdiction are, in part, as follows:

(a) Where a Circuit Court of Appeals has rendered a decision in conflict with the applicable

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*The designation "R" followed by the page number is a reference to the Transcript of Record in *Reed v. United States;* the designation "P" followed by the page number is a reference to the Transcript of Record in *Parkhurst v. United States.*

decisions of this Court, this Court has jurisdiction on certiorari to review the action of the Circuit Court of Appeals. (Rule 38 of the Rules of the Supreme Court; *Department of Treasury v. Ingram Richardson Manufacturing Co.*, 313 U.S. 252, 85 L.Ed. 1313, 61 S.Ct. 866; *Helvering v. Price*, 309 U.S. 409, 60 S.Ct. 673, 84 L.Ed. 836; *National Licorice Co. v. National Labor Relations Board*, 308 U.S. 535, 60 S.Ct. 108, 84 L.Ed. 451; *Lane v. Wilson*, 305 U.S. 591, 59 S.Ct. 249, 83 L.Ed. 374.)

(b) Certiorari will be granted where a Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. (*Postal S.S. Corporation v. El Isleo*, 308 U.S. 378, 60 S.Ct. 332, 84 L.Ed. 335.)

(c) Certiorari will be granted where a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure of a lower Court as to call for an exercise of this Court's power of supervision. (*United States v. Rizzo*, 297 U.S. 530, 56 S.Ct. 580, 80 L.Ed. 844; *Le Tulle v. Scofield*, 308 U.S. 531, 60 S.Ct. 75, 84 L.Ed. 447; McNabb v. United States, 318 U.S. 332, 87 L.Ed. 918.)

(d) A writ of certiorari will issue on the ground of "importance" of the issue presented, or on other grounds similar to those covered by

the rule. (*Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 62 S.Ct. 966, 86 L.Ed. 1336; *Williams v. Jacksonville Terminal Company*, 314 U.S. 590, 62 S.Ct. 64, 86 L.Ed. 476; *National Labor Relations Board v. Express Publishing Company*, 312 U.S. 426, 61 S.Ct. 693, 85 L.Ed. 930; *Sprague v. Ticonic National Bank*, 306 U.S. 623, 59 S.Ct. 463, 83 L.Ed. 1028.)

(e) A writ of certiorari will issue where important constitutional questions are involved. (*Glasser v. United States*, 315 U.S. 60.)

STATEMENT OF MATTERS INVOLVED.

Edward David Reed and Jack Henry Parkhurst are members and student ministers of Christ's Church of The Golden Rule. They entered the Church, together with their parents and family in 1944, the year of the Church's foundation. (R 151, 168, 178; P 163, 206, 207.) Petitioner Reed was then fifteen years of age, and petitioner Parkhurst was seventeen. (Govt. Exhibit No. 2)

Since that time they have devoted themselves exclusively to the task of preparing themselves for their Church's ministry. This has been a full time undertaking with no compensation, save that gained by "giving to the world a better concept of Christ Jesus' teachings." (R 157, 168, 169, 177; P 206, 218)

The basic purpose of the Church was to illustrate and establish "the practicability of Christ's teachings,

a working model, so that the world could see and understand the practical nature of His teachings," and to show that His teachings constituted "a way of life, not just a way of words." (P 158)

Christ's Church of The Golden Rule is just over eight years old, and has a membership of between 600 and 650 persons. There are approximately 20 or 25 members between the ages of 18 and 26. (P 163) Since the formation of the Church in 1944 there have been no new enrollments or admissions as student ministers of young men of draft age, i.e. between the ages of 18 and 26. (P 201)

The Church maintained a theological seminary in which petitioners Reed and Parkhurst were enrolled. (R 147; Govt. Exhibit No. 1) The basic purpose of the Church was reflected in the nature of the training program for its student ministers. The main emphasis of the training was upon *practical* demonstrations of the application of The Golden Rule in every day life—to make it possible for the student ministers to take their teachings into any walk of life and practice them in their daily associations with each other. (R 155, 156; P 158, 159, 161, 210) Thus, at various student minister training projects in the State of California the student ministers applied their teachings while co-operating in the operation of church-owned and managed activities such as ceramics groups, dairies, sawmills, laundries, and the like. (P 161, 162) All funds received from those activities are placed in a common treasury and used to further the propagation of the Church's ministry.

(R 162) In addition, the course of study included daily morning devotional services, the writing and preaching of sermons, inspirational meetings, hymn services, and the like. These were participated in by the student ministers at the same training projects where the practical application phase of their studies was performed. (R 161, 169 to 173; P 208 to 214)

Petitioners Reed and Parkhurst were performing this theological training when they registered under the Universal Military Training Act and in their classification questionnaires applied for exemption in Class IV-D as student ministers. (Govt. Exhibit Nos. 1 and 2; R 168 to 173; P 207 to 214) On August 8, 1949, petitioner Parkhurst was classified IV-D by Local Board No. 38, and on August 14, 1950, petitioner Reed received a classification of IV-D by Local Board No. 36. (P 40; R 27)

On July 2, 1951, petitioner Reed, after a personal hearing by his draft board, was reclassified I-A. On July 16, 1951, without any hearing by his board, petitioner Parkhurst was reclassified I-A. (R 28; P 42)

Petitioner Reed appeared again before his local board on July 23, 1951, and was continued in class I-A. (R 38, 39) The appeal board affirmed his classification on August 30, 1951. (R 66) He was ordered to report for induction on February 1, 1952 (R 66) and did so, but refused to take the step forward at the end of the induction ceremonies. (R 88) He was indicted on April 2, 1952, for violating Section 12(a) of the Universal Military Training & Service Act, and

was brought to trial on May 19, 1952, before District Judge Edward P. Murphy. (R 3, 7)

Petitioner Parkhurst requested his first hearing before Local Board 38 on July 25, 1951. (P 43) On August 6, 1951, and prior to any personal hearing, the board reclassified him from I-A to III-A, on the evidence of his marriage to a fellow student minister, Etola May Reed, on September 12, 1949. (P 45, 206-207) Petitioner Parkhurst appeared before his draft board for the first time on September 11, 1951, to request the reinstatement of his IV-D classification. (P 48, 49, 51) He was retained in III-A. The Appeal Board, on October 25, 1951, reclassified him I-A. (P 90) He was ordered to report for induction on February 5, 1952. (P 99) He complied with the induction requirements to the point of taking the step forward, and at that point refused to be inducted in the Armed Services. (P 113) He was indicted on April 2, 1952, and brought to trial on June 16, 1952, before District Judge Edward P. Murphy. (P 3, 7)

During the trial petitioner Parkhurst testified he had not had a fair or impartial hearing before the local board. (P 216) He stated that his classification had been changed from IV-D to I-A with no change in his fact circumstances, that the board had stated his church was not really a church, that his answers were taken as a joke by the board members, who received the information about his church's program with "nods and smirks". (P 216, 217) This was denied by the chairman of the local board, called as a rebuttal witness by the Government. (P 289, 290)

During the trials of both petitioners the defense sought, through representatives of the Catholic Church, Local Draft Board Members, the Director of Selective Service for the State of California, and pertinent memoranda and reports, to introduce evidence of Selective Service practice and policy (including evidence of Congressional intent) concerning the exemption of lay brothers of the Catholic Church. Such evidence would have established that the regular practice and policy of the Selective Service System was to classify as "ministerial activities" in the case of lay brothers the type of activities which petitioners performed as student ministers of Christ's Church of The Golden Rule. (R 107 to 115; R 117 to 133; R 138 to 142; R 142 to 145; P 21 to 24; P 129 to 135; P. 137 to 144; P 149, 150; P 151 to 155)

Local Board 38 received no additional facts between the date of petitioner Parkhurst's original classification in IV-D (August, 1949) and his declassification to I-A (July, 1951) (P 129) Board Chairman Dooley testified that petitioner Parkhurst's activities were deemed to be secular and not ministerial. (P 298) The board as a whole concluded that the "manual labor" aspect of the training program was a major factor in their decision that petitioner Parkhurst was not entitled to exemption as a student minister. (P 312, 313)

The United States Attorney repeatedly and erroneously referred to the founder of defendant's church, in the presence of the jury during trial and closing argument, as a convicted seditionist who counseled

young men to evade service in the armed forces. There was no evidence on the point anywhere in the record. (P 167 to 170; P Supp. Tr. of Rec. 362, 363)

The United States Attorney accused defense counsel, in the presence of the jury during trial and closing argument, of putting the Catholic Church on trial and appealing to anti-Catholic prejudice. (P 200; P Supp. Tr. of Rec. 355, 356, 357)

The United States Attorney repeatedly asserted that another member of petitioner Parkhurst's Church was already convicted of the same offense petitioner was to be convicted of. There was no evidence on the point anywhere in the record. (P 235)

The United States Attorney charged petitioner Parkhurst with being part of a studied, persistent plan to counsel young men to evade service in the armed forces. There was no evidence on the point anywhere in the record. (P Supp. Tr. of Rec. 351)

The United States Attorney charged defendant with seditious and traitorous activity against the United States. There was no evidence on the point anywhere in the record. (P Supp. Tr. of Rec. 351, 352)

The United States Attorney stated to the jury that if a verdict was returned in favor of petitioner Parkhurst it would mean the Universal Military Training and Service Act could not be law, and such a verdict would constitute the greatest blow to the enforcement of selective service in the history of the act. (P Supp. Tr. of Rec. 363)

During the trial of petitioner Parkhurst the Government sought to secure the names of the advisory board of elders of the Church. A canon law prohibited this without the consent of the persons involved. On objection by defense counsel the Court stated "If he doesn't know who is to ordain him there is something wrong with the organization." (P 251, 252)

The trial court permitted the United States Attorney to repeat thirteen (13) times, over objections, that petitioner had knowingly and deliberately refused to submit to induction. The court then stated that it was obvious that defendant was evading the question, despite several replies already given. (P 262 to 269)

The trial court permitted the United States Attorney to ask ten (10) times, over objections, if petitioner would go down and be inducted and take noncombatant service. (P 283 to 286)

In all of the above instances the trial court refused to admonish the United States Attorney, or instruct the jury to disregard his remarks, or order a mistrial.

Verdicts of guilty were returned against both petitioners, and each received the heaviest sentence provided by law, five (5) years imprisonment and a fine of $10,000. (R 13, 14; P 13, 14)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The Fifth Amendment to the United States Constitution, as it relates to a fair and complete hearing for a Selective Service registrant before his local draft board.

2. The Fifth Amendment to the United States Constitution, as it relates to arbitrary and discriminatory classifications given members of one group of registrants when compared with classifications given members of another group similarly situated.

3. The pertinent portions of the Universal Military Training & Service Act and regulations issued thereunder, as set forth in the Appendix, *infra*.

QUESTIONS PRESENTED.

1. Did the trial court err in refusing to admit evidence of Selective Service practice and policy (including evidence of Congressional intent) with respect to the meaning of "ministerial activities" and what constitutes a "recognized divinity school", which evidence would have permitted the Court to decide whether petitioners had been deprived of due process of law?

2. Did the trial court err in refusing to admit evidence of Selective Service practice and policy (including evidence of Congressional intent) with respect to the meaning of "ministerial activities" and what constitutes a "recognized divinity school", and sub-

mitting to the jury with appropriate instructions the resultant question of whether petitioners had been discriminated against in violation of the due process guaranty of the Constitution?

3. In the face of a conflict in the evidence on whether petitioner Parkhurst had received a fair hearing and procedural due process of law by his local board, was it error for the trial court to refuse to submit the question to the jury with appropriate instructions?

4. Was it prejudicial misconduct for the United States Attorney to:

(a) Repeatedly and erroneously refer to the founder of petitioner's Church, in the presence of the jury, during trial and closing argument, as a convicted seditionist who counseled young men to evade service in the armed forces, when there was no evidence on the point anywhere in the record?

(b) Accuse defense counsel, in the presence of the jury, during trial and closing argument, of putting the Catholic Church on trial and appealing to anti-Catholic prejudice?

(c) Repeatedly assert that another member of petitioner's Church was already convicted of the same offense petitioner was to be convicted of, when there was no evidence on the point anywhere in the record?

(d) Charge petitioner with being part of a studied, persistent plan to counsel young men to evade service in the armed forces, when there was no evidence on the point anywhere in the record?

(e) Charge petitioner with seditious and traitorous activity against the United States, when there was no evidence on the point anywhere in the record?

(f) State to the jury that if a verdict is returned in favor of petitioner it would mean the Universal Military Training and Service Act could not be law, and such a verdict would constitute the greatest blow to the enforcement of selective service in the history of the Act?

5. Did the Court abuse its discretion and commit prejudicial misconduct by:

(a) Stating during the trial of petitioner Parkhurst, in the presence of the jury, "If he doesn't know who is to ordain him there is something wrong with the organization."?

(b) Stating that it was obvious that petitioner was evading the question, after permitting the U. S. Attorney to repeat thirteen (13) times, over objections, that petitioner had knowingly and deliberately refused to submit to induction?

(c) Permitting the U. S. Attorney to ask ten (10) times, over objections, if the petitioner would go down and be inducted and take non-combatant service?

(d) Failing to admonish the U. S. Attorney and instruct the jury to disregard his remarks, and failing to order a mistrial for the prejudicial misconduct of the U. S. Attorney described in the previous section (4 (a), (b), (c), (d), (e) (f))?

6. Did the Court err in denying petitioners' motions for judgments of acquittal for the reason that

there was no basis in fact for petitioners' classifications of I-A?

REASONS FOR ALLOWANCE OF WRIT.

A Writ of Certiorari should be issued to review the judgment of the Court of Appeals for the Ninth Circuit for each of the following reasons:

1. The decision of the court below is in conflict with the decisions of this Court in the following cases where similar issues were involved:

Cox v. United States, 332 U.S. 442;

Estep v. United States, 327 U.S. 114;

Harrison v. Northern Trust Co., 317 U.S. 476;

United States v. Dickerson, 310 U.S. 554, 562;

United States v. American Trucking Assns., 310 U.S. 534, 543;

N. Y. Central R. Co. v. Edward H. Johnson, 279 U.S. 310, 318;

Brasfield v. United States, 272 U.S. 448, 450.

2. The decision of the Court below is in conflict with the following decisions of other circuit courts of appeal where similar issues were involved:

Niznik v. United States (C.A. 6th Cir. 1949), 173 F. (2d) 328;

United States v. Zieber (C.C.A. 3rd Cir. 1947), 161 F. (2d) 90.

3. The issues are of grave public importance in that constitutional rights affecting the public are here involved.

CONCLUSION.

For the reasons stated above petitioners pray that their petition for a Writ of Certiorari be granted.

Dated, San Francisco, California,
August 24, 1953.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW AND JURISDICTION.

The opinion below was not yet officially reported at the time of the submission of this Petition. The bases of this Court's jurisdiction are set forth in the Petition for Writ of Certiorari.

SPECIFICATION OF ERRORS.

1. The Court below erred in rejecting evidence offered by appellants respecting Selective Service practice and policy (including evidence of Congressional intent) on the point of what constituted a "recognized divinity school" and "ministerial activities" sufficient to exempt a registrant from military service. Such evidence would have established an unfair discrimination against appellants in violation of due process of law. The substance of the rejected evidence is as follows:

(a) Opinion No. 14 of the Director of Selective Service, embodied in State Director Advice 213(b); Second Report of the Director of Selective Service, pages 240-241; Local Board Memoranda of Selective Service System. (R 122-127; P 140-144). These documents would have demonstrated the liberal intent of Congress and the practice and policy of the Selective Service System in characterizing "ministerial activities", and defining a "recognized divinity school" in connection with exemptions afforded ministers of religion and theological students.

(b) Testimony from two Catholic Church officials, local board members, and the Director of Selective Service for the State of California, establishing the regular practice and policy of the Selective Service System to exempt lay brothers of the Catholic Church, and characterizing as "ministerial activities" those labeled "secular" for petitioners. (R 107 to 115; R 138

to 142; R 142 to 145; P 21 to 24; P 129 to 135; P 149, 150; P 151 to 155)

2. The Court below erred in refusing to submit to the jury the question whether petitioners had been arbitrarily and unfairly discriminated against in violation of due process of law, and in refusing to instruct the jury as follows:

"If you determine that the defendant, Jack Parkhurst, has been deprived of due process of law as the result of an arbitrary and discriminatory classification by his local draft board, then it is your duty to acquit the defendant of the offense charged." (Defendant's Requested Instruction No. 6; P 328)

"I instruct you that the decisions of the local boards are final only if they are made in conformity with the Universal Military Training and Service Act and the Regulations issued under the Act. The Regulations limit and define the jurisdiction of the boards, and when a board's action is the result of prejudice, and its classification arbitrary or based on discrimination, then the conduct of the board is lawless and beyond its jurisdiction. An order to report for induction under these circumstances would be void and of no effect." (Defendant's Requested Instruction No. 13; P 329)

"If you find from the evidence the local board classified the defendant I-A because of his religious beliefs or membership in Christ's Church of The Golden Rule, you must acquit the defendant and return a verdict of not guilty." (Defendant's Requested Instruction No. 23; P 329)

"I instruct you that if you find the refusal of the local board to exempt the defendant as a student minister, and his selection and classification in Class I-A, was not done in an impartial manner, then such classification was void and beyond the jurisdiction of the local board, and you must return a verdict of not guilty in favor of the defendant." (Defendant's Requested Instruction No. 25; P 330)

"Each registrant under the Universal Military Training and Service Act is entitled to equal justice under the law. If you find that the policy or practice of classifying ministers or student ministers in Class IV-D has been followed in the case of registrants from another religious group or groups in the same or similar circumstances as the defendant, but has not been followed in the case of defendant, I instruct you such action is contrary to Selective Service Regulations and the due process of law guaranteed by our Constitution. In these circumstances, defendant is entitled to be acquitted by your verdict of not guilty." (Defendant's Requested Instruction No. 28-A; P 330)

"If you find that the policy or practice of the Selective Service System, with respect to other religious organizations, has been to classify as ministerial activities the activities performed by the defendant in his ministerial training program, and that Local Board 38 acted in violation of this policy or practice in classifying the defendant, then you are instructed that such action is contrary to the due process of law guaranteed by our Constitution. In these circumstances the defendant is entitled to your verdict of not guilty."

(Defendant's Requested Instruction No. 32; P 330).

It was further error for the court to give the following instructions requested by the United States Attorney:

"I instruct you that you are not to decide whether the Local Board acted properly or improperly in classifying the defendant in Class I-A or Class III-A.

"I instruct you further that you are not to decide whether the Appeal Board acted properly or improperly in classifying the defendant in Class I-A. . . ." (Plaintiff's Instruction No. 7; P 330)

3. It was error for the court below, in the face of a conflict of evidence, to refuse to submit to the jury the question of whether petitioner Parkhurst had received a fair hearing and procedural due process of law by his local draft board, and to refuse to charge the jury as follows:

"I instruct you that if you find as a fact that the defendant Jack Henry Parkhurst was deprived of a fair hearing before Local Board No. 38, then due process of law, as guaranteed by our Constitution, has not been afforded him, and the order of the Draft Board is therefore null and void. In this event, I instruct you that you must return a verdict of not guilty for the defendant" (Defendant's Requested Instruction No. 30; P. 330)

"Every registrant is entitled to a fair and impartial hearing before the local board considering

his case. If you find from the evidence that any action or statement by the local board reflected a prejudice or a bias against the defendant so as to prevent him from receiving a fair hearing, you are instructed that the local board's classification was null and void. In such a circumstance defendant's constitutional right to due process of law has been violated, and you must return a verdict of not guilty." (Defendant's Requested Instruction No. 31; P 330)

It was further error for the court to give the following instruction requested by the United States Attorney:

> "I instruct you that the defendant was given a full and fair hearing by the Local Board and likewise given a full and fair hearing by the Appeal Board in accordance with the provisions of the Act and the rules and regulations made pursuant thereto." . . . (Plaintiff's Instruction No. 14; P 331)

4. It was misconduct for the United States Attorney, without any evidence in the record to support his charges, nor with any relevancy to issues being tried, to refer repeatedly to the founder of petitioner's Church as a convicted seditionist; to charge petitioner Parkhurst with being part of a studied plan to evade service in the armed forces and with committing seditious and traitorous activity against the United States; to accuse defense counsel of putting the Catholic Church on trial and appealing to anti-Catholic prejudice; and to tell the jury that a verdict for petitioner would be the greatest blow to

the enforcement of the selective service act in its entire history.

5. The trial court abused its discretion and committed error in refusing to take any action to admonish the United States Attorney, or to correct the results of the misconduct described in the preceding section 4; in stating "If he doesn't know who is to ordain him there is something wrong" with petitioner's church; in permitting the U. S. Attorney to repeat thirteen (13) times, over objections, that petitioner had knowingly and deliberately refused to submit to induction; in permitting the U. S. Attorney to ask ten (10) times, over objections, if defendant would go down and be inducted and take non-combatant service.

6. The Court erred in denying petitioners' Motions for Judgment of Acquittal for the reason that there was no basis in fact for the classification of I-A given petitioners.

ARGUMENT.

I. THE COURT ERRED IN REJECTING EVIDENCE RELATING TO SELECTIVE SERVICE PRACTICE AND POLICY (INCLUDING EVIDENCE OF CONGRESSIONAL INTENT) ON THE POINT OF WHAT CONSTITUTED "MINISTERIAL ACTIVITIES" SUFFICIENT TO EXEMPT A REGISTRANT FROM MILITARY SERVICE.

The defense in both of the instant cases sought to establish that the activities performed by petitioners in the "application" phase of their theological training were "ministerial activities" within the intent of

Congress and according to the settled practice and policy of the Selective Service System. Whether such activities were to be deemed "ministerial" or "secular" was a vital factor in determining their Selective Service Classifications.

The Universal Military Training and Service Act required them to be students preparing for the ministry and "pursuing full time course of instruction in recognized theological or divinity schools" in order to be exempt from military service. (Section 6(g), 62 Stat. 604, as amended by act of June 19, 1951). The meaning of "full time course of instruction" and "recognized" theological or divinity schools is patently ambiguous and unclear.

The testimony at the trial demonstrated that the application period of petitioners' ministerial training occupied the major part of their course of instruction. It was the most important part. (R 155, 156; P 161) Yet the draft boards considered this activity secular and not ministerial, mere "manual labor". Board Chairman Dooley testified this aspect of the Church's training program was a major factor in their decision that petitioner Parkhurst was not entitled to exemption as a student minister. (P 298, P 312, 313)

Testimony of several Catholic church officials, the Director of Selective Service for the State of California, a local board member, and a report and opinion of the National Director of Selective Service, General Hershey, all excluded by the Court, would have demonstrated that essentially identical activities

performed by the lay brothers of the Catholic Church were characterized, pursuant to the liberal intent of Congress, as "ministerial activities" in regularly exempting the lay brothers as "ministers of religion". This was not done in the cases at bar. It was petitioners' position, accordingly, that the local boards had violated petitioners' guaranty against arbitrary and discriminatory classification contained in the Fifth Amendment.

The practice of exempting the lay brothers was a reflection of the rule of liberal construction which appeared in the enactment and administration of the first of the Selective Service Acts, in 1940, and which has continued, by congressional acquiescence in the administrative interpretation of the succeeding Acts of 1948 and 1951, to the present day. In determining what activities were to be labeled "ministerial" Congress made clear that the lay brothers were within the purview of the Statutory exemption.

> Part IV, Opinion No. 14, June 12, 1941, amended November 2, 1942 (incorporated in State Director Advice 213-B) Director of Selective Service General Hershey.

The Director of Selective Service, in referring to the Section of the 1940 Act relating to students preparing for the ministry, stated:

> "The term 'recognition of such schools' means not the approval by educational accrediting agencies, but recognition by a denomination of the school as leading into the ministry of the denomination. It, therefore, included a wide range of

types of institutions and grades of institutions under the term 'theological or divinity school'. The same wide extension of the term 'studying for the ministry' in theological and divinity schools that was applied to the term 'ministers of religion' was followed here. Courses might be as brief as one year or might extend over a period of from eleven to fifteen years."

Selective Service in War Time, Second Report of the Director of Selective Service 1941-42, Gov. Printing Office, 1943, p. 241.

The trial court refused to admit any evidence of Opinion No. 14 of the Report of the Director of Selective Service. (R 122-127; P 140-144)

The Supreme Court, in *Cox v. United States,* 332 U. S. 442, 451, ruled that "Opinion 14 furnishes a proper guide to the interpretation of the Act and Regulations."

Petitioners also sought to introduce evidence, through the testimony of several Catholic Church officials, local board members, and the Director of Selective Service for the State of California, that it was the settled practice and policy of the Selective Service System to consider as "ministerial activities" the type of training activities performed by petitioners. This was done regularly in cases involving the lay brothers of the Catholic Church. This was not done in the cases at bar.

The trial court likewise refused to admit any of this evidence, rejecting petitioners' contention that it would establish an arbitrary and discriminatory vio-

lation of Selective Service policy and practice, and hence an abridgment of their due process guarantees. (R 107 to 115; R 138 to 142; R 142 to 145; P 21 to 24; P 129 to 135; P 149, 150; P 151 to 155)

The use of legislative history in the interpretation of statutes, and particularly where the statute contains ambiguities, as in the instant case, has become standard practice in the Federal Courts.

United States v. Dickerson, 310 U.S. 554, 562;
United States v. American Trucking Assns., 310 U.S. 534, 543;
Sparkman, Legislative History and the Interpretation of Laws, 2 Ala. L. Rev. 189 (1950).

The history of the statute since its enactment is frequently a material consideration. The construction of the statute by those charged with its administration, particularly high executive officers, is entitled to great weight. And Congressional acquiescence in the judicial or administrative interpretation of a statute is to be considered evidentiary of the legislative intent at the time of enactment.

Billings v. Truesdell, 321 U.S. 542, 552;
United States v. American Trucking Assn., supra at 549;
Gray v. Powell, 314 U.S. 402;
Kern River Co. v. United States, 257 U.S. 147;
Stout v. Hancock, 146 F. 2d 741;
Carriso, Inc. v. United States, 106 F. 2d 707.

In *Harrison v. Northern Trust Co.,* 317 U.S. 476, it was held reversible error for the lower court to refuse to consider the legislative history of the statutory pro-

vision involved, even though the provision on its face seemed plain and unambiguous.

In *Niznik v. United States* (C. A. 6th Cir., 1949), 173 F. 2d 328, at 336, the court ruled that while the decision in *Cox v. United States,* supra, foreclosed reweighing the evidence considered by the local board, if the board's classification was the result of prejudice or discrimination such material questions of fact should be submitted to the jury to determine if the registrants had been afforded due process of law.

A discriminatory classification, of course, is in violation of Selective Service Regulations and therefore beyond the jurisdiction of the Boards.

Selective Service Regulations Sec. 1622.1(d);
Estep v. United States, 327 U.S. 114.

In its opinion the court below stated, "On his trial each sought to introduce testimony concerning exemptions accorded by selective service boards to lay brothers of the Catholic Church, and each contends that the court erred in refusing to permit the introduction of such testimony for the jury's consideration." [P 367] This statement misconceives petitioners' position.

Petitioners do *not* contend that the error of the trial judge was merely, or solely, in refusing to allow the *jury* to consider the above referenced testimony. Petitioners contend that, minimally, such testimony was proper for the consideration of the *court.* There is nothing in the decision in *Cox v. United States,* 332 U.S. 442, that precludes the *trial court* itself from determining if the Fifth Amendment to the Constitu-

tion was violated by an arbitrary and discriminatory classification.

In the *Cox* case the contention was made that the jury should have been permitted to determine if the defendant was "erroneously" classified, and, also, if he was indeed a minister of religion. The Supreme Court held this would have been improper, that a *jury* could not pass on such issues. (See page 452 of opinion)

The holding in the *Cox* case does not in any way dispose of petitioners' contention that, at the least, the trial court should have admitted and considered the testimony respecting the classifications extended to the lay brothers of the Catholic Church and those given the student ministers of Christ's Church of the Golden Rule. Exclusion of such testimony for *any* purpose was consequently prejudicial error.

Even were one to concede, *arguendo,* that the jury is foreclosed from reviewing a charge of unconstitutional classification in a selective service case, surely the accused is entitled to a decision on this issue by the trial *court.* To hold otherwise is to hold that nowhere in our judicial framework is there a provision for review of an administrative act claimed, by a person accused of a felony, to be violative of due process and unconstitutional.

The court below further misconceived the position taken by petitioners when it stated, "In the *Tyrrell* case, as here, it was contended that the trial court erred in declining to submit to the jury the question whether the defendant's right to freedom of religion

had been violated by the board's determination that the prescribed program of instructions did not constitute theological studies." [P 369]

There has been no contention on petitioners' part that their right to freedom of religion has been violated by an act of the local board. There has been no contention that the jury should have considered such a question.

The First Amendment to the Constitution of the United States, and its guaranty respecting religion, has never been at issue in the instant cases. Petitioners have consistently maintained that the question of whether they have been deprived of due process of law under the *Fifth Amendment* is a proper one for the *court* to determine, as a minimum. Petitioners also contend that where a conflict in the evidence raises a factual question concerning the violation of due process of law the jury may properly determine the issue.

The decision in *Tyrrell v. United States*, 200 F. 2d 8, did not dispose of this question, since the question was never before the court in that case.

II. THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY THE DISPUTED QUESTION OF WHETHER PETITIONER PARKHURST HAD RECEIVED A FAIR HEARING BEFORE HIS LOCAL BOARD.

There was a conflict in the evidence as to whether a fair hearing had been afforded petitioner Parkhurst. He testified that he had not received a fair and

impartial hearing. He stated that his classification had been changed from IV-D to I-A with no change in his fact circumstances, that the board had stated his church was not really a church, that his answers were taken as a joke by the board members, who received the information about his church's program with "nods and smirks". (P 216, 217) This was denied by the chairman of the local board, called as a rebuttal witness by the Government. (P 289, 290)

The law places upon the local board the responsibility for providing the registrant a full and fair hearing. When this is disputed, as was the case in *Niznik v. United States* (C.A. 6th Cir. 1949), 173 F. 2d 328, where the registrant, a Jehovah's witness, adduced facts that indicated his hearing was unfair, the registrant is entitled to have that question resolved by a jury. The court in the *Niznik* case stated, at page 336:

> "It is true that it was decided in the *Cox* case that the decisions of the Local Boards made in conformity with the regulations are final even though they may be erroneous . . . and the Courts are not to weigh the evidence to determine whether the classification made by the Local Board was justified. However, the regulations limit and define the jurisdiction of the Boards, and when a Board's action is the result of prejudice, and its classification based upon discrimination, its conduct is lawless and beyond its jurisdiction.
>
> ". . . *The material questions of fact, as heretofore indicated, should be submitted to the jury under appropriate instructions as to the law, so that it may be determined whether the registrants*

have been afforded due process of law." (Emphasis added)

See also:

United States v. Zieber (C.C.A. 3rd Cir. 1947), 161 F. 2d 90.

Yet the Court of Appeals for the Ninth Circuit, in its opinion in the instant case, stated as follows:

> "It is contended that the court erred in refusing to submit to the jury the disputed question whether Parkhurst had received a fair hearing before the local board. *We regard that question as properly one for the court,* since it correctly held that there was a basis in fact for the board's classification." [P 370, emphasis added]

This holding is directly *contra* to that of the Court of Appeals for the Sixth Circuit in the *Nicak* case. Whether or not the trial court correctly held there was a basis in fact for the classifications of I-A is not the decisive test. Even though a basis in fact exists for such classifications, every registrant is nonetheless entitled to a fairly conducted personal hearing before his board. If such a hearing is rendered unfair, by reason of bias or prejudice on the part of board members, the mere existence of a bias in fact for this classification does not validate the classification. The registrant should nonetheless secure a reversal of the board's decision, since he is entitled as a matter of right under selective service regulations to a full and fair personal hearing. And where at the trial a conflict in the evidence is produced on this issue the de-

fendant may properly have such conflict resolved by the jury. To conclude otherwise would make a complete nullity of the *Niznik* decision, in so far as it relates to this question.

The appeal board, under existing regulations, always acts without benefit of a personal hearing extended to the registrant. It should be pointed out that the appeal board could not possibly learn from the printed record or summary of the hearing the nature of the actions of the local board members which were prejudicial to petitioner Parkhurst. It cannot be said that its perusal of the written record of the local board supersedes *all* action of the local board. A contrary holding would substitute, in effect, a written record in place of the personal hearing assured all registrants by selective service regulations. Its action in placing the registrant in Class I-A cannot be said to have been an affirmation of the propriety of the personal hearing.

III. THE UNITED STATES ATTORNEY CHARGED MISCONDUCT BY REPEATED REFERENCE TO EXTRANEOUS ISSUES ON WHICH THERE WAS NO EVIDENCE AND WHICH HAD NO RELEVANCE TO THE ISSUES BEING TRIED.

The U.S. Attorney, without any evidence in the record to support his charges, nor with any relevance to issues being tried, referred repeatedly to the founder of petitioner Parkhurst's Church as a convicted seditionist who counseled young men to evade service in the armed forces; charged petitioner with being part

of a studied plan to evade service in the armed forces and with committing seditious and traitorous activity against the United States; accused defense counsel of putting the Catholic Church on trial and appealing to anti-Catholic prejudice; and told the jury that a verdict for petitioner would be the greatest blow to the enforcement of the Selective Service Act in its entire history. (P 167 to 170; P 200; P 235; P Supp. Tr. of Rec. 351, 352, 355 to 357; 362, 363)

Counsel are under a duty to prevent the jury from considering issues on which there is no evidence, and to desist from appeals to passion and prejudice. An omission to discharge this duty, because it makes a trial unfair, is prejudicial error.

Hockaday v. Red Lines, Inc. (D. C.-1949), 174 F. 2d 154.

The *Hockaday* case was an action for personal injuries. Defense counsel had referred in cross-examination and final argument to the failure of plaintiff to serve in the army as a condition for a suspended sentence for assault. The court held this was prejudicial misconduct and granted a new trial to plaintiff. It stated, at page 156:

> "Under our system of jurisprudence . . . it is the duty of the court and of its officers, the counsel of the parties, to prevent the jury from the consideration of extraneous issues, of irrelevant evidence, and of erroneous views of the law, to guard it against the influence of passion and prejudice, and to assure to the litigants a fair and impartial trial. An omission by court or counsel to discharge this duty, or a persistent violation

of it, is a fatal error, because it makes the trial unfair."

Ordinarily prejudicial remarks of counsel call for the direction of a mistrial.

Beck v. Wings Field (C.C.A.3-1941), 122 F. 2d 144.

IV. THE COURT ERRED IN REFUSING TO ADMONISH OR RESTRAIN THE UNITED STATES ATTORNEY IN THE COMMISSION OF HIS MISCONDUCT. THIS, TOGETHER WITH THE COURT'S OWN COMMENTARY ON THE EVIDENCE, WAS AN ABUSE OF DISCRETION.

During the trial of petitioner Parkhurst the Government sought to secure the names of the Advisory Board of Elders of the Church. A canon law prohibited this without the consent of the persons involved. On objection by defense counsel the Court stated "If he doesn't know who is to ordain him there is something wrong with the organization." (P 251, 252)

The trial court permitted the United States Attorney to repeat thirteen (13) times, over objections, that petitioner had knowingly and deliberately refused to submit to induction. The court then stated that it was obvious that defendant was evading the question, despite several replies already given. (P 262 to 269)

The trial court permitted the United States Attorney to ask ten (10) times, over objections, if petitioner would go down and be inducted and take noncombatant service. (P 283 to 286)

The court, as well as counsel, has the duty to see that every trial is fairly and impartially conducted. It should prevent the jury from considering extraneous issues and guard it against the influence of passion and prejudice.

Union Pac. R. Co. v. Field (C.C.A. 8th-1905), 137 Fed. 14, 15.

The public interest requires that the court, of its own motion, protect suitors in their right to a verdict uninfluenced by appeals to prejudice. It should intervene whenever necessary to insure a fair trial.

Brasfield v. United States, 272 U.S. 448, 450;
Aetna Life Ins. Co. v. Kelley (C.C.A. 8th-1934), 70 Fed. 2d 589.

In *N. Y. Central R. Co. v. Edward H. Johnson,* 279 U.S. 310, at page 318, the court said:

> "The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice . . . The failure of counsel to particularize an exception will not preclude this Court from correcting the error."

It is conceded, of course, that where the sole fact issue for the jury's determination has been admitted, misconduct as described above in points III and IV

would not be prejudicial. However, it would be both material and prejudicial in the event of a new trial in which the issue of a fair hearing would be submitted to the jury. In such a circumstance, it is submitted, court and counsel are obligated to assure the defendants an environment free from extravagant, inflammatory, and prejudicial language and conduct.

V. THE COURT ERRED IN DENYING PETITIONERS' MOTION FOR JUDGMENT OF ACQUITTAL FOR THE REASON THAT THERE WAS NO BASIS IN FACT FOR THE CLASSIFICATION OF I-A GIVEN PETITIONERS.

There was no conflict in either petitioners' Selective Service files or in the record of the trial court respecting the manner in which petitioners' time was occupied. There was no dispute concerning the fact they were preparing for the ministry under the direction of their Church. There was no evidence contradicting the fact that they were satisfactorily pursuing their Church's course of instruction.

In order for the classification of I-A to rest upon *any* basis in fact, they necessarily had to rest upon a conclusion that petitioners were not following "a full-time course of instruction in a recognized theological or divinity school." (Section 6(g), 62 Stat. 604, as amended by Act of June 19, 1951)

Whether a theological school is "recognized" is, of course, not a matter for determination by the draft boards. As the Director of Selective Service said of a comparable phrase in the 1940 Act, "The term 'recog-

nition of such schools' means not the approval by educational accrediting agencies, *but recognition by a denomination of the school as leading into the ministry of the denomination.*" (*Selective Service in Wartime,* Second Report of the Director of Selective Service (1941-42, G.P.O., 1943, p. 241) (Emphasis added)

See also:

Watson v. Jones, 80 U.S. 679, 727.

Whether petitioners were pursuing "a full time course of instruction" turned on the designation given to the application phase of petitioners' training program. And these activities, as set out more fully in Point I of this Argument, have been characterized as "ministerial activities" by Congress and the Selective Service System. Thus, the settled policy and practice of Selective Service administration, as well as Congressional intent in enacting the various Acts, confirm the designation given these activities by petitioners and their Church—viz.: full time instruction in preparation for the ministry of Christ's Church of The Golden Rule.

In view of this, it cannot be said that any basis in fact existed for the classification given petitioners. The motions for judgment of acquittal should have been granted. It was error to deny them.

Estep v. United States, 327 U.S. 114.

CONCLUSION.

For the reasons stated above petitioners pray that their petition for a Writ of Certiorari be granted.

Dated, San Francisco, California,
August 24, 1953.

Respectfully submitted,

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(Appendix Follows.)

Appendix

Universal Military Training & Service Act, Section 12, Title 50 U.S.C., App. Section 462 (a).

"* * * any person * * * who shall knowingly fail or neglect or refuse to perform any duty required of him under * * * rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine not more than $10,000, or by both such fine and imprisonment * * *. No person shall be tried by court martial in any case arising under this title unless such person has actually been inducted for the training and service prescribed under this title * * *".

Selective Service Regulations, Part 1622.9(a).

"In Class IV-D shall be placed any registrant * * * who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full time course of instruction in a recognized theological or divinity school."

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tions for rehearing were denied on July 27, 1953 (R. 243; P. 373). The petition for a writ of certiorari was filed on August 26, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in a criminal prosecution for refusal to be inducted into the armed forces, the trial judge erred in instructing that there was a basis in fact for the rejection of petitioners' claims for exemption as full-time students for the ministry.

2. Whether the trial judge erred in refusing to admit evidence by which petitioners sought to establish whether exemptions had been granted in purportedly similar cases.

3. Whether petitioner Parkhurst, who filed with the appeal board a detailed supplement to the transcript of his hearing before the local board, without mention therein of conduct at the hearing indicating bias, was entitled to have the jury consider his assertion to that effect made for the first time in the criminal prosecution.

4. Whether, in view of the fact that the single issue before the jury was knowing refusal to be inducted, and in view of petitioner Parkhurst's own admissions on that issue, there was prejudicial misconduct at the trial.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Universal Military Training and Service Act and regulations issued thereunder are set forth in the Appendix, *infra*, pp. 34–36.

STATEMENT

Petitioners seek review of the judgments of the Court of Appeals for the Ninth Circuit (R. 242; P. 372), affirming judgments of the District Court for the Northern District of California adjudging petitioners guilty upon the verdict of a jury (R. 13–14; P. 13–16), and imposing sentences of five years' imprisonment and fines of $10,000, in each case, for violation of the Universal Military Training and Service Act by refusing on February 1 and February 5, 1952, respectively, to be inducted into the armed forces.

Petitioner Reed's record with the selective service system may be summarized as follows:

He registered on September 1, 1948, stating his date of birth to be April 27, 1929, a mailing address of P. O. Box 3652, Rincon Annex, and, as the name and address of a person who would know his address, Mrs. A. P. Nordscot, 801 Silver Avenue, San Francisco, California. He stated his occupation as "student ministry" and his "[p]lace of employment or business" as 801 Silver Avenue (Gov. Ex. 1; R. 21–22).

On December 3, 1948 (Gov. Ex. 2; R. 25), Reed filed his classification questionnaire stating, "[m]y address now is 801 Silver Avenue." He listed a

Social Security number. He stated, in the portion of the questionnaire relating to ministers and students:

> I am a student preparing for the ministry under the direction of Christ's Church of the Golden Rule in a theological or divinity school. I am attending the Christ's Church of the Golden Rule Theological Seminary located at 801 Silver Avenue.

Reed also attached to his classification questionnaire a statement as follows (R. 26):

> It is my desire to bring before the attention of the local board the importance of being able to complete my studies as a student minister of Christ's Church of the Golden Rule so that I might live Christ Jesus' teachings, setting an example for all humanity and proving the practicability of Christ Jesus' teachings and the Golden Rule for the benefit of all people of the world.
>
> It is my firm belief that Christ Jesus' teachings are the only salvation to world problems of today and if lived would bring peace and happiness to all mankind.
>
> With these facts in mind I believe the local board will see the importance for me to continue to study as a student minister of Christ's Church of the Golden Rule.

Also attached to the classification questionnaire was a letter (R. 26–27) bearing the letterhead "Theological Seminary, Christ's Church of the

Golden Rule, 801 Silver Avenue, * * *" stating to the Selective Service system:

> This is to certify that Edward David Reed is registered and enrolled as a full-time student minister in the Theological Seminary of Christ's Church of the Golden Rule.
>
> He is earnestly and sincerely pursuing his studies, endeavoring to become qualified to teach, preach, and illustrate the precepts of the great Wayshower of man.

The letter was signed by one "Lewis B. Hart, D. D., Ph. D., M. A., Assistant Dean of the Faculty, Theological Seminary."

Under Series VIII, "Present Occupation", Reed stated "I am now a full-time student." Reed listed eight years of elementary school and two years of high school (he did not graduate). He listed, in addition, "Christ's Church of the Golden Rule, student minister." The length of time attended was stated at four years, eight months, and no "degrees or certificates" were listed. The place at which conscientious objection was required to be noted was left blank. (Gov. Ex. 2; R. 22–25.)

On August 14, 1950, Reed was classified IV–D (Gov. Ex. 2; R. 27). On June 6, 1951, the local board, by letter, asked Reed for:

> * * * a precise report of the amount of time that you spend as a minister of Church, and also a report of the other

> activities that you may be engaged in, so that your file may be brought up to date. [Gov. Ex. 3, R. 29.]

In reply (Gov. Ex. 4; R. 31–33), Reed sent the board a letter enclosing a copy of the constitution of the church, canon laws, a document "Our Vision," and miniature sermon reference data, #1, Section 1. In this letter, he stated, *inter alia:*

> I spend considerable time each day studying the prescribed selections of our Church literature as set forth for daily meditation and study for each day of the week, and the writing of miniature sermons based upon this study and meditation for each day. Also regular attendance and active part at our morning Devotional Services and at other regularly established study and class meetings for the purpose of further study of the Ideals and Principles of the teachings of Christ Jesus. Time between classes, study periods and meetings is spent exclusively in the practical application and promulgation of the Ideals, Ideas and Principles of Christ's Church of the Golden Rule and to demonstrate the practicability of Christ Jesus' teachings as a way of life so that all mankind can live in peace and harmony.
>
> I receive nothing in the way of material reward for the services rendered, but my time and the benefit therefrom are spent exclusively for the advancement of our Christian Ministry as Christ Jesus taught.

The constitution and canon laws, while establishing various "ecclesiastical" and "temporal" bodies and a "College of Pastors", and while empowering the ecclesiastical "organization" to provide for "ordination" (Def. Ex. C: Const. II, p. 2, V. (2), p. 4, VII, p. 5; Canon Law #3, p. 4, #5, p. 5), referred to the entire organization as a ministry and established no definite, separate group as ministers nor any curriculum for becoming a minister in the ordained sense. "Student ministers" were defined as persons not yet admitted "to lay or ordained membership. This is a probationary status." Lay members were defined as those who wished to dedicate their lives "to the ministry of the Church" (Canon Law #15 (3), (5), p. 11). The definition of a "project" was not restricted to the ordinary concept of a seminary but included an enterprise in which a group "undertakes to apply and illustrate Christianity" (Canon Law #22, p. 14).

On June 29, 1951, the board notified Reed to appear for a special hearing on July 2. At that hearing, the board concluded that the evidence did not warrant IV–D classification, and Reed was reclassified I–A (Gov. Ex. 2; R. 28). The summary of the hearing (Gov. Ex. 5; R. 34–37) stated, *inter alia:* that Reed was unable to name anyone who had been ordained and was unable to say when he would be ordained, the failure to ordain anyone thus far being ascribed to litigation; that

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Reed's statements of the length of time he had studied were contradictory (four to five years versus eight years), that questions were "evasively answered * * * as if the registrant was well schooled in his duties to answer"; that Reed testified that "they have frequent study periods, such as taking fifteen minutes in the mornings for studies, and then apply them in practice sermons right after, and also later in the evenings, consisting of ten or less persons in the class"; that Reed stated that students did "various types of trade-work around the church such as carpentering, kitchen help, and all around handy-man work, as well as their "practice of sermons and passages," and that he received his food, clothing, and entire support from the church.

Reed thereafter requested a hearing on the I–A classification (Gov. Ex. 6; R. 37–38). This hearing took place on July 23, 1951, and resulted in continuance of Reed in Class I–A (Gov. Ex. 2; R. 38–39). The hearing was fully transcribed, and developed only the following additional elements (Gov. Ex. 7; R. 41–52): Reed now stated that he had been a "student minister" of the organization since 1944; that he had "lived there" since 1944, and that the course of study to be a minister would normally be four years but there had been delay due to litigation. His entire family was also "studying to be ministers," including a 12-year-old sister and a 74-year-old grandmother. Reed's testimony as to the instruc-

tors was not clear.[2] His statement of the daily routine added a half-hour period of bible study prior to the 15-minute period of "devotion." Reed presented for the file a copy of a letter of his church to General Hershey urging recognition of the church for the purposes of selective service.

On August 2, 1951, Reed filed with the board a memorandum providing rephrased answers to the questions as to when he would be ordained

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[2] The following is typical (R. 42–44):

Mr. SWIG. How many instructors have they got?

No response.

Mr. SLAVICH. About how many instructors are there in the school?

REGISTRANT. Quite a few.

Mr. SLAVICH. Well, how many?

No response.

Mr. SLAVICH. Well, do they have five, six, ten, fifteen? More than that?

No response.

Mr. SLAVICH. How many are there?

REGISTRANT. Three delegates, five elders.

Mr. SWIG. How many teachers are there to teach you how to preach sermons? How many teach you?

REGISTRANT. Well, we all teach.

Mr. SWIG. Do you have any ordained ministers?

REGISTRANT. We have one ordained minister.

Mr. SWIG. In the whole organization? What's his name?

REGISTRANT. Rev. Hart, he helps us with our studies.

Mr. SLAVICH. Is he the only help?

REGISTRANT. We have our classes.

Mr. SLAVICH. How many teachers? Just one.

REGISTRANT. The only one who is ordained.

Mr. SWIG. You previously said you did not know of anyone who had been ordained by your church.

REGISTRANT. He has not been ordained by our church, but he teaches us and supervises our literature committee.

and how he spent his time as a student. He closed the memorandum with a remark, concerning the hearing, that after these questions, "I was asked innumerable questions which to me have no bearing as to my status as a student minister." (Gov. Ex. 8; R. 52–56.) He also filed a letter of appeal (Gov. Ex. 9; R. 52–53, 56–59).[3]

On August 30, 1951, the appeal board classified Reed I–A by a vote of 4–0 (Gov. Exs. 2 and 14; R. 65–66). On February 1, 1952, he refused to be inducted (R. 88–90, 92–93, 95, 184).

At the trial before a jury, in May 1952, Reed and two persons connected with his organization

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[3] These items stated only insubstantial additions and changes. E. g., in the board transcript, Reed had been reported as stating that he devoted the morning half-hour period to Bible study (R. 46), while the rephrased answer referred to study of "church literature" (R. 55). The appeal letter repeated the assertion that the student training projects enabled student ministers to learn to apply the golden rule to "everyday life" (R. 57–58). With the appeal letter, there were also sent to the appeal board 19 items of church literature, correspondence, and the like (Gov. Ex. 11; R. 59–61). One of these items was a certificate, dated July 31, 1951, by the "Board of Review" of the organization, signed by its chairman, that Reed was "properly enrolled as a student for the ministry" of the organization, that Reed "consistently prepares his weekly sermons" and had a good attendance record, that Reed did not use tobacco, alcoholic beverages, or unbecoming language, and that Reed was "honestly and sincerely pursuing his studies and ministerial training toward ordination as a minister" (Def. Ex. A–1; R. 75–77). Further literature was received on August 13, 1951, and forwarded to the appeal board, and the case was reviewed but not reopened, on August 13 and 28, 1951 (Gov. Ex. 2 and 13; R. 63–64).

testified to substantially the facts and the general course of activity theretofore presented to the board as study for the ministry (R. 146–184, 192–193).

Reed added that in November 1948, and for seven months before, he had been at a "training project" of his organization in Mendocino County as a sawyer in a sawmill (R. 168–169). Marion T. Huff, secretary of the elected delegates' committee (R. 146), added a correction that there had been one ordination in the eight years since establishment of the organization, the ordination of a new senior elder by the advisory board of elders (R. 148, 151).

Petitioner Parkhurst's record with the selective service system may be summarized as follows:

He registered on September 1, 1948, stating his date of birth to be April 23, 1927, a mailing address at 801 Silver Avenue, San Francisco, California, and, as the name and address of a person who would know his address, Miss A. Nordskott, 801 Silver Avenue. He stated his occupation as "student minister" and his "[p]lace of employment or business" as the Christ Church of the Golden Rule, 801 Silver Avenue. (Gov. Ex. 1; P. 33.)

On October 28, 1948, Parkhurst filed his classification questionnaire, stating "[m]y address now is 801 Silver Avenue." He listed a Social Security number. He stated, in the portion of the questionnaire relating to ministers and students, "(a)

I am a student preparing for the ministry under the direction of Christ's Church of the Golden Rule in a theological or divinity school. (b) I am attending the Theological Seminary of Christ's Church of the Golden Rule located at 801 Silver Avenue." He also stated "I am now a full time *student minister.*" After the printed words:

> The job I am now working at is (give full title, for example: Construction draftsman, turret lathe operator, stationary engineer, farm laborer, prosecuting attorney, physics teacher, policeman, marriage license clerk, etc.):

Parkhurst typed the words "Studying for the ministry," and after the words:

> I do the following kind of work in my present job (be specific. Give a brief statement of your duties),

he wrote "Whatever is required of a student minister." (Gov. Ex. 2; P. 34–37.)

Parkhurst listed education of eight years of elementary school and three years of high school (he did not graduate). He listed, in addition, "Theological Seminary of Christ's Church of the Golden Rule. Course of study: Studying for ministry." He stated that he had attended the Seminary for four years and four months, without receipt of a degree or certificate. (Gov. Ex. 2; P. 38.)

Parkhurst signed the form stating that he was a conscientious objector, but stated that he desired no forms for pursuing the claim as he was re-

questing classification as a student minister (Gov. Ex. 2; P. 38–39).

Parkhurst attached a letter to the Selective Service System under the letterhead of the "Theological Seminary, Christ's Church of the Golden Rule, 801 Silver Avenue," as follows (Gov. Ex. 2; P. 39–40):

> This is to certify that Jack Henry Parkhurst is a student minister of the Ecclesiastical society of Christ's Church of the Golden Rule. He is sincere and consistent in his theological studies and application.
>
> (S) (Rev.) Lewis E. Hare,
> DD., Ph. D., M. A.,
> *Assistant Dean of the Faculty,*
> *Theological Seminary, Christ's*
> *Church of the Golden Rule.*

On August 8, 1949, Parkhurst was classified IV–D by a vote of 2–0. Some eleven months later, on June 22, 1950, he notified the board of a change of address to Eagle Point, Oregon, stating "I am still studying for the ministry in the same capacity as I was when I registered in September 1948." On July 12, 1951, he notified the board of a change of address to "P. O. 3852, Rincon Annex, San Francisco 19." (Gov. Ex. 2, 3, and 4; P. 40–42.)

On July 16, 1951, Parkhurst was reclassified I–A (Gov. Ex. 2; P. 42). He presented proof to the board that he had been married on September 12, 1949. He was reclassified III–A (Gov. Ex. 2 and 7; P. 44–46). He requested a hearing

because of reclassification from IV–D to III–A (Gox. Ex. 2 and 9; P. 47–48) and appeared before the board on September 11, 1951 (P. 49). A full transcript of the hearing was taken and disclosed testimony by Parkhurst to the following effect (Gov. Ex. 10, 11, 12; P. 48–65):

He testified that he lived at 801 Silver Avenue and followed his "course of studies" at the same address (P. 51). He had become a member of the organization seven years before and become a student minister at the same time (P. 51–52, 53–54). The "course" consisted of daily morning "devotion" of about a quarter hour (P. 51, 52, 56) three or four hours of "study" or "students' meetings" in the evening, and eight hours of "laboratory work"—physical labor for the organization (P. 51, 59–60).

The devotional services consisted of a song, reading from the Bible by one of the "ministers," and then "study" of what had been read. There was also "study alone" (P. 53). On Monday evenings, for an hour to two hours, there was discussion "in classes" of "miniature sermons" written out by the student ministers without instruction (P. 54–55, 59–60). On Tuesday evenings there was study for an hour, without supervision, of literature of the organization (P. 55), and various types of "meetings" and sometimes "a free period" (P. 56); on Wednesday evenings, one hour study of the literature and "group discussion of the sermons" led by one of the students

(P. 57); on Thursday, Friday, and Saturday evenings, no scheduled meetings—"a reasonably free time" (P. 57), except Friday evening "business meetings" for discussion of "what is coming up, the laboratory and the mental or physical labors" (P. 58). On Sundays, no assignments were given beyond the morning 15-minute devotion period (P. 58–59).

The "laboratory work" was directed by "whoever happens to be in charge at the time" (P. 54). No wages as such were paid for the eight hours of physical work per day, but the organization supplied room, board, and clothing (P. 60). Parkhurst's work consisted of gardening on a farm in Marin County owned by the organization (P. 62–63) and he explained orally and by a written statement that the physical work was part of the training since it afforded practice in actual application of the golden rule (Gov. Ex. 12; P. 60–61, 63, 68–71).

The student ministers ranged in age from 15 to 20 (P. 59). Parkhurst did not know whether anyone had ever been ordained but asserted that

> about six years ago a date had been set, but the church has been tied up in court, and we don't have time for examinations [P. 63].

At the close of the hearing, the chairman, referring to the absence of a curriculum or any ordination of ministers, voted for retention of

the III–A classification. The two other members voted in accord (Gov. Ex. 2; P. 64–65, 72).

On October 2, 1951, Parkhurst filed a notice of appeal, together with certain notes on the hearing, a certificate, and literature of his organization, including a copy of the organization's constitution and canon laws, discussed *supra*, p. 7 (Gov. Ex. 2; 13 A–E; P. 73–75).[4]

On October 25, 1951, Parkhurst was classified I–A by the appeal board (Gov. Exs. 2, 14; P.

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[4] The notes stated that the stenographic transcript of the hearing was "accurate" but "all was not included" (P. 75). The notes, however, added only further emphasis of the argument that the eight hours of physical work constituted study for the ministry, and added a question by the board chairman as to whether Parkhurst would accept limited service in the army (P. 75–83). The certificate by the chairman of the "Board of Review" of the organization (a board made up of student ministers [P. 83]), stated that Parkhurst was "properly enrolled as a full time student for the ministry" of the organization, that he was "carrying out the course of study and training as prescribed by the duly constituted ecclesiastical government," that he did not use tobacco, alcohol, or unbecoming language, and that he was "sincerely pursuing his studies and ministerial training toward ordination as a minister" (Gov. Ex. 13–B; P. 83–85). The letter of appeal stated, *inter alia* (Gov. Ex. 13–E; P. 87):

"I do not even pretend to devote my life to *pulpit preaching*, but rather I am learning to *practice* that others who desire may follow my example. The world has been under the influence of pulpit preachers for centuries and it has accomplished little or nothing. * * *

"I expect to be ordained the middle of next year provided I meet the requirements, which, of course, are that I am sufficiently able to demonstrate the principles described previously in this statement."

88–90). He wrote to the State Selective Service headquarters, complaining of the decision. The file was sent to State headquarters, which thereupon advised Parkhurst, on November 19, 1951, that the file disclosed that the local and appeal boards had acted properly (Gov. Ex. 2, 16, 18, 19; P. 91–97). On January 24, 1952, Parkhurst wrote to the local board, *inter alia* (Gov. Ex. 23; P. 99–102):

> * * * [B]ecause I had every reason to believe that my qualifications as a student minister would be respected I did not file a C. O. questionnaire.
>
> Because of the nature of the ministry for which I am studying, I am unavoidably also a C. O.
>
> I feel a responsibility to God (our Creator) which I do not see my way clear to disobey, therefore I am forced to choose between obedience to a higher law and a man-made law. When this choice comes I see no other alternative than to respect the Supreme Power of the Universe, the Highest Law I know of. * * *
>
> I will comply with the law up to the step forward. At this point my convictions will not permit me to go further because of the nature of the ministry for which I am studying (the ministry of Love). * * *
>
> * * * * *
>
> In the light of this responsibility I find it impossible for me to comply with the

requirements of military training and life. I will make no effort to avoid the consequences of this action.

The letter was considered by the board and it was determined not to reopen the case (Gov. Ex. 2; P. 102). On February 5, 1952, Parkhurst refused to be inducted (Gov. Ex. 24; P. 113–115; 119–120, 122).

At the trial before a jury, in June 1952, Parkhurst and a person connected with his organization testified to substantially the facts and the general course of activity theretofore presented to the board as study for the ministry (P. 157–166, 171–178, 180–186, 188–194, 197–200, 202–203, 206, 208–214, 216, 218–229, 239–246, 270–271, 273–288). Parkhurst added that he "believe[d]" he had informed the board that there was supervision of the "training" by "elected delegates" (P. 213). He specified, upon cross-examination, that his manual work in training projects had included dairy, agricultural, ranch, and sawmill work, the latter work having been performed at Comptche, California, during the six months preceding, and several months following, his registration. He admitted that, several months after his registration, he had gone to a ranch in Oregon and stayed there until he received his I–A classification, and that he had had only several weeks of actual residence at 801 Silver Avenue since he had registered. (P. 239–244.) He also admitted that he had viewed the record of his personal appear-

ance before the board, a week or ten days after the appearance (P. 215, 217, 273), but contended that he did not receive a fair hearing (P. 216–218, 234–239, 246–249, 273):

> Because when I entered I knew that they had changed my classification from 4–D to 1–A with no change in facts. I also knew that they had made the statement that our church was not really a church, and third, I knew that the—well, there just was something in the air that I could not explain, their nods and smirks that passed.
>
> * * * * *
>
> * * * [W]hen I entered they cast around their general nods and smirks, and as though, "This is another church case," and then after I started answering the questions they took my answers as a joke. They didn't care for the answers. Just a—well, something very difficult to explain; something that could not be put down on paper.
>
> * * * * *
>
> * * * They were very interested in the questions, yes, to get them on the record, but they were not interested in my answers. The questions they asked were determined ahead of time to where they could not have been interested in my answers as to ask any questions. [P. 216–218.]

Upon cross-examination it appeared that he only "understood" that the board had stated that his organization was not recognized, and that this

understanding emanated from a remark to that effect by Robert Tyrrell, another member of his organization claiming exemption as a ministerial student and convicted for refusal to be inducted (P. 234, 248–249); *Tyrrell* v. *United States,* 200 F. 2d 8 (C. A. 9), certiorari denied, 345 U. S. 910. The chairman of the board testified that the charge of smirking, and the like, was "absolutely false" (P. 289–290).

Marian T. Huff, secretary of the elected delegates' committee, added the information that the organization was eight years old, numbered between 600 to 650 affiliates, of which three-fifths were student ministers and 20 to 25 were between the ages of 18 and 26 (P. 163, 192–193); that there had been no enrollments of men of draft age since formation of the organization (P. 201), and that the organization had made one ordination, in ordaining a new senior elder by action of the advisory board of elders (P. 174). She ascribed Parkhurst's possession of a Social Security number to the fact that "during certain litigation the bankruptcy trustees had to conduct the church's projects, and of course in their capacity had to take out social security on all of the student ministers" (P. 177–178).[5]

Each of the petitioners, during the course of his trial, sought to prove by various witnesses,

[5] Testimony of Parkhurst to same effect: P. 229–233, 286–287.

such as a selective service director or board member, and Catholic priests, and by general historical writings and directives of the national selective service director, that it was the policy and practice of the selective service system and of local boards to exempt as ministers and students for the ministry certain registrants from other religious organizations, such as Catholic lay brothers, Lutheran lay teachers, Jehovah's Witnesses, and colporteurs of the Seventh-Day Adventist organization, who were purportedly engaged in activities which petitioners claimed were comparable to their activities (R. 113–114, 122–125, 127, 141, 145; P. 23–24, 134, 140–143, 149–150, 155). The trial judge refused to admit the evidence, basically upon the ground that if the selective service board's denial of exemption to petitioners had basis in fact, it was not the province of the jury to determine whether exemptions had improperly been granted in other cases, nor was it the province of the jury to determine the law as to what constituted a student for the ministry either by determining what had been done in other cases or by evaluating pronouncements of administrative officials—the province of the jury being, under the issues of the present cases, to determine whether petitioners had knowingly refused to be inducted. The trial judge also adverted to the remoteness of any comparison of petitioners' group with the groups sought to be adduced as

comparable. (R. 115–116, 128, 131–132, 139–140, 142, 145; P. 149, 155.)

The two cases were consolidated for appeal and both judgments of conviction were affirmed (R. 242; P. 372).

ARGUMENT

1. The essence of this case is that the record contained ample basis for the selective service boards' rejection of petitioners' claims for exemption as ministerial students from military service. The statutory exemption is only for students preparing for "the ministry," pursuing "full-time" courses of "instruction" in theological "schools."

Here the record disclosed that petitioners worked a full eight-hour day at manual labor for an organization which was essentially an enterprise in cooperative living rather than a "school," and which, in turn, furnished petitioners their food, shelter, clothing and entire living needs. There were 15-minute devotional periods in the mornings and the organization supplied religious literature and references for individual study and group discussions in the evenings, but there was no "full-time" course as required by the statute, and there was no appreciable progress toward ordination at any stated or computable time. No one had even been ordained in the eight years of the organization's existence, except in the single case of the designation of a new

head for the organization by the "advisory board of elders."

There was no "instruction" other than that to be found in the Bible or the organization devotional materials. The "student ministers" compared notes among themselves concerning their writings of "sermons" and the "sermons" were apparently sent in to the main files of the organization, but the record shows no active instruction by teachers in any respect resembling the ordinary concept of full-time courses of "instruction," required by the statute.

Petitioners urged that their manual work was full-time training or "laboratory work" in living the golden rule, but the record disclosed no "instruction" as to either the work or the conduct while working. Moreover, if there had actually been any schooling or instruction it would have been a preparation, not for a ministry in any ordinary concept of the term, but a preparation for an effort of the entire organization to persuade the world to join in the organization's enterprises. The ministry contemplated under the statute is clearly not one in which the entire membership of an organization is to be exempted as ministers to the whole world. The ministers in the statutory sense are only the particular persons who are the spiritual leaders of the specific organization (*Cox* v. *United States,* 332 U. S. 442, 451), in the sense that

they are clearly set apart and distinguishable from the members generally. That this is the intended scope of the ministerial exemption is clear from the definitions of "duly ordained minister" and "regular minister" in Section 16 (g) of the Act, as explained in S. Rep. 1268, 80th Cong., 2d Sess., p. 13. See the Government's brief in *Dickinson* v. *United States*, No. 57, this Term. It follows that only one who is pursuing a full-time course of instruction which will result in his becoming a minister in this statutory sense is entitled to exemption as a ministerial student. As we point out below (*infra*, pp. 28–29), it is undisputed that the petitioners would become ministers (at some unknown date) only in the same sense as most of the other members of Christ's Church of the Golden Rule.

Petitioners were thus clearly outside the scope of the exemption, even upon full acceptance of their statements of fact. It is, moreover, patent on the face of the record, that petitioners' general reliability was subject to such serious question as to prohibit indiscriminate acceptance of their statements. There was too much of evasion and partial disclosure in their written documents, with actualities revealed only when the local boards called in petitioners and examined them. Thus,

for example, while the registration procedure and the questionnaire forms made specific provision for the possible difference between (1) registrant's residence, (2) registrant's mailing address, (3) address where registrant's whereabouts would be known, and (4) the address where registrant was employed, and while petitioners were each working in church industries outside of San Francisco, each petitioner gave only the 801 Silver Avenue, San Francisco, California, address as the place of employment or business, and each stated, "I am attending the Christ's Church * * * Theological Seminary at 801 Silver Avenue." Parkhurst, over a year and a half later, furnished the board an Oregon address, but the date of his doing so, June 22, 1950, was about a year and a half after his arrival there late in 1948, and coincided suspiciously with the mailing, on June 20, 1950, of an erroneous notice of exemption as minister to his fellow-worker Robert Tyrrell (*Tyrrell* v. *United States,* O. T. 1952, No. 536, R. 48, 221–222). Parkhurst again changed his address with the local board on July 12, 1951, to a San Francisco P. O. box of the organization, just six days after Reed had been mailed a I–A classification after personal examination by Reed's local board.

Similarly strange was the fact that, despite the places in the questionnaires for disclosure of

present occupation,* Parkhurst filled in this portion of the form by claiming to be a "full-time student minister" and filling in two subsequent blanks as follows (Gov. Ex. 2; italics supplied):

> 2. The job I am now working at is (give full title, for example: Construction draftsman, turret lathe operator, stationary engineer, *farm laborer,* prosecuting attorney, physics teacher, policeman, marriage-license clerk, etc.): *Studying for the ministry.*
>
> 3. I do the following kind of work in my present job (*Be specific. Give a brief statement of your duties*): Whatever is required of a *student minister.*

Accordingly, when the facts concerning the great preponderance of manual labor were elicited—and with some difficulty—from petitioners at the board hearings, the boards were entitled to doubt the asserted spiritual nature of petitioners' particular way of obtaining a liv-

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* Series VIII.—PRESENT OCCUPATION:

1. Every registrant must check *each* of the following boxes appropriate to his case and follow the instructions indicated.

(a) I am now working on a farm, orchard, or ranch.

☐ If this box is checked complete Series IX.

(b) I am now working in a nonagricultural occupation.

☐ If this box is checked complete this series.

(c) I am now a full-time student.

☐ If this box is checked complete Series XI.

(d) I now have no employment nor am I a full-time student.

☐ If this box is checked complete Parts 7 and 8 of this series.

ing. The boards clearly were not required as a matter of law to find petitioners to be students preparing for the ministry and pursuing full-time courses of "instruction" in a theological or divinity "school." *Tyrrell* v. *United States,* 200 F. 2d 8, 10–11 (C. A. 9), certiorari denied, 345 U. S. 910, involving the same organization and substantially similar work.

2. Petitioners sought to prove that it was the policy and practice of the selective service system to exempt as ministers and, presumably, as students for the ministry, certain registrants from other religious organizations, such as Catholic lay brothers, Lutheran lay teachers, Jehovah's Witnesses, and colporteurs of the Seventh-Day Adventist organization, who were purportedly performing activities which petitioners claimed to be comparable to theirs. For this purpose, petitioners offered to adduce the testimony of two Catholic priests as to the activities of members of their particular orders and the allowance of exemptions to their members. They sought to question a member of each of the two respective local boards, and also the state director of selective service, as to exemptions for other religious organizations. They also offered in evidence for the jury certain passages from an opinion of the national selective service director issued in 1942 and certain passages from his report for 1941–1942, indicating the grant of exemptions to Catholic lay brothers, as "regular ministers of

religion," and to Lutheran lay teachers, and Jehovah's Witnesses.

This evidence was properly rejected, whether it be considered as an offer to the judge to aid him in the interpretation of the applicable law by reference to administrative practice, or as an offer to bring before the jury facts tending to show bias and discrimination. On either theory, the offered evidence would not have the remotest relevance unless it were shown that the groups covered by the offer of proof could be deemed, as petitioners claimed, comparable to the group represented by petitioners.

It is clear that no such comparability existed. It is common knowledge that each of the groups to which the offer of proof related—the Catholic lay brothers, the Lutheran lay teachers, the colporteurs of the Seventh-Day Adventists—are, at the very least, a group set apart and distinct from the general mass of each of such religious groups. Petitioners were not thus set apart as students for the ministry nor would they be in their ultimate ministry. The entire membership of Christ's Church of the Golden Rule is deemed a "ministry of example" (R. 153). In the *Reed* case, Mrs. Marion Huff, secretary of the elected delegates of the church (R. 146) testified that, for the present, this "ministry of example" was confined to their own people (R. 153). In the *Parkhurst* case, she testified that about three-fifths of the group were student ministers (P.

193), that there were other groups of "affiliates" and "co-workers," but she defined affiliates as "persons who are interested in the church's teachings and would like to know more about them, but who have taken no active steps to become students at all" (P. 191–192). Thus, in essence, the entire congregation is the student body for the ministry of the whole congregation. This one element sufficiently differentiates petitioners' situation from that presented by the other groups to make irrelevant any consideration of the classification given to such other groups. Since, as we have shown, petitioners were patently ineligible for the exemption claimed by them, the trial judge was clearly correct in refusing to explore, and in refusing to allow the jury to explore, the propriety of the classification of other persons whose relationship to the general memberships of their religious organizations is wholly different from that of petitioners to the members generally of their own sect.

3. In the case of Parkhurst, it is urged that the question of bias against him by the local board should have been submitted to the jury (Pet. 12, 21–22, 30–33). The contention is without merit. Petitioner adduced no admissible evidence on this point, but only, in effect, his subjective conclusions or accusations that the local board must have been biased to rule against him. Moreover, no claim of bias was raised in the administrative proceeding or against the ap-

peal board, whose *de novo* decision is the decision here involved. The accusation is first made in the criminal proceeding for refusal to be inducted.

Parkhurst first testified that the board had stated that his organization was not a recognized religious organization. Upon cross-examination, he conceded that this was hearsay—what a fellow draft-opponent, Russel Tyrrell, had told him that the board had said (*supra,* pp. 19–20). Beyond this, Parkhurst adduced only his impression—actually a conclusion rather than statement of fact—that the board was interested only in reducing his answers to writing rather than in considering his answers (*supra,* p. 19). Although he sought to shore this up with factual statements concerning smirks and nods, the total and actual testimony was nothing more than a nebulous conclusion and accusation—a repetition of a pleading rather than evidence for jury consideration, especially in the face of the fact that Parkhurst, in his very careful review of the hearing in his extensive memoranda for the appeal board (*supra,* p. 16), made not the slightest mention of any such conclusion, nor did he do so in his letter to the state director (*supra,* p. 17). Indeed, in his own rewrite of the hearing, Parkhurst had stated that the board chairman had "seemed to accept" the explanation of the manual work as constituting study (Gov. Ex. 13–A, p. 2; P. 77). Actually, there was, as noted (*supra,* pp. 22–27), such ample basis in fact for the board's decision, without need

of any bias whatsoever, as to compel the conclusion that the local board's decision was a direct and logical product of the weakness of petitioner's own case rather than of pre-judging of the merits.[7]

It is to be observed that the action of the appeal board is the final action here complained of. It was an action *de novo* upon a record which included a verbatim transcript of all of Parkhurst's assertions and argument. No claim is made that the appeal board acted upon the basis of bias. It required no training in the law or sharp mental capacity for Parkhurst, when detailing at extreme length to the appeal board many complaints as to the local board's decision, to state, as well, a complaint as to conduct which was purportedly so important and clear in his memory at the much later time of the criminal proceedings. Having failed to complain before the classification process was complete, Parkhurst was not entitled to raise the issue of visible bias as a defense for his refusal to obey the final induction order. *Davis* v. *United States,* 203 F. 2d 853 (C. A. 8), certiorari denied, 345 U. S. 996.[8]

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[7] The board chairman, an attorney of 25 years' practice, termed petitioner's assertion "absolutely false" (*supra*, p. 20).

[8] Petitioners cite *Niznik* v. *United States*, 173 F. 2d 328 (C. A. 6), certiorari denied, 337 U. S. 925, and *United States* v. *Zieber*, 161 F. 2d 90 (C. A. 3), certiorari denied, 333 U. S. 827, for general language of those cases that questions of fact involved in a claim of bias are to be submitted to a jury. *Niznik* v. *United States* did not involve a situation, such as

[4] On behalf of petitioner Parkhurst, error is claimed because of various comments by the United States Attorney before the jury and because of several comments of the trial judge and

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here, in which the purported evidence of bias was so much a matter of mere conclusion by the registrant that, as a matter of law, there was no evidence to go to the jury; indeed, the court, in *Niznik* v. *United States*, far from addressing any attention to that aspect, was confronted with just the reverse—a situation in which the Government conceded that evidence of outright statements by the board members tended to establish bias, but the trial court had deemed such evidence to be immaterial upon a mistaken belief that *Cox* v. *United States*, 332 U. S. 442, precluded entering into such a question if there was a basis in fact for the classification (O. T. 1948; No. 734, 735, 736, Br. in Opp. 14–15). Moreover, neither Niznik nor Commodor entered into extensive review of the local board hearing, as did Parkhurst, without stating a claim of prejudice; Niznik only filed a brief statement of appeal and a letter of an appeal agent, and Commodor affirmatively stated his complaint about the local board hearing to the appeal board (O. T. 1948, Nos. 734, 735, 736, R. 161, 168, 218). Similarly, in *United States* v. *Zieber*, 161 F. 2d 90 (C. A. 3), the issue as to whether there was evidence of fact, rather than conclusions of law by a witness, to go to a jury was not dealt with; there had been erroneous instructions in the trial court on the assumption that if the local board acted in good faith their erroneous refusal to receive evidence from the registrant could not be challenged. The court's remand on the ground that the issue of the sufficiency of a local board's summary was to be submitted to the jury in the absence of the raising of that question with the appeal board, was challenged by the Government in its Brief in Opposition (O. T. 1947, No. 503); registrant had filed a petition for certiorari on the ground that he was entitled to a dismissal rather than a remand, and the Government noted that, since registrant had failed to appeal to the appeal board, the remand order by the Court of Appeals was more favorable to registrant than was required.

his failure sufficiently to admonish and restrain the United States Attorney with respect to the claimed improprieties (Pet. 12–14, 22–23, 33–35). We submit that an examination of the full context in which the purported improprieties occurred will in each case disclose that the comments complained of were neither irrelevant nor actually to an improper effect. However, as pointed out by the court below (P. 371), since the only issue submitted to the jury was whether Parkhurst knowingly refused to submit to induction and since Parkhurst's own admissions amply established the knowing refusal (*supra*, pp. 17–18, P. 262–269) the conduct complained of could not have resulted in prejudice.

CONCLUSION

The questions presented were correctly decided below and are, in addition, so restricted to the particular facts of this case as to deprive them of general or future importance. No conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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OCTOBER 1953.

APPENDIX

Statutes and Regulations Involved

Universal Military Training and Service Act:

Section 6 (g) [50 U. S. C. App., Supp. V, 456 (g)]:

> Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, * * * shall be exempt from training and service (but not from registration) under this title.

Section 16 (g) [50 U. S. C. App., Supp. V, 466 (g)]:

> (1) The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.
>
> (2) The term "regular minister of religion" means one who as his customary

vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

Section 12 (a) [50 U. S. C. App., Supp. V, 462 (a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title * * * or directions made pursuant to this title, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Regulations, Title 32, CFR (1951 ed.):

Section 1626.12:

Statement of person appealing. The person appealing may attach to his appeal a statement specifying the matters in which he believes the local board erred, * * *.

Section 1626.23:

Preliminary review. The appeal board will carefully check each file to determine whether all steps required by the regulations have been taken, whether the record is complete, and whether the information in the file is sufficient to enable it to determine the registrant's classification. If any steps have been omitted by the local board, if the record is incomplete, or if the information is not sufficient to enable the appeal board to determine the classification of the registrant, the appeal board shall return the file to the local board with a request for additional information or action. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1953